Ketua Pengarah Kastam dan Eksais DiRaja Malaysia v Atlantic Scope (M) Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-01-2-94
GOPAL SRI RAM, VC GEORGE AND ABU MANSOR JJCA
12 FEBRUARY 1995

Customs and Excise *— Forfeiture — Security deposit — Seizure of prohibited goods imported without licence — Deposit paid for release of goods — Offence compounded and importer not charged — Whether deposit can be forfeited — Whether forfeiture confined only to goods and proceeds of sale — Customs Act 1967 ss 115(1), 128(1) & 131(3)*

The respondent had applied for an order for the return of the security deposit of RM1,158,224.80 which it had paid to the appellant to obtain the release of 1,840 cartons of cigarettes which the respondent had imported without a licence and which the appellant had seized under s 114(1) of the Customs Act 1967 ('the Act'). The High Court judge granted the application with the order that the amount be returned less the sum of RM5,000 payable to the appellant as a compound fee to the offence allegedly committed by the respondent under s 135(1)(a). [See [1994] 3 MLJ 669.] The appellant has appealed against that order, contending that the trial judge had erred in not giving effect to ss 128(1) and 131(3) of the Act by ordering the forfeiture of the security deposit. The appellant argued that it was empowered to proceed under s 128(1) of the Act to forfeit the security deposit as the goods had already been released.

Held, dismissing the appeal:

(1) The security deposit was called for under s 115(b) of the Act in the event of the court making an order for the forfeiture of such amount under s 127(1A) or s 128(4). Therefore, the judge could not possibly have acted under s 131(3) to order forfeiture under s 127(1A) or s 128(4). Furthermore, as no prosecution of the respondent ever took place, it follows that no order under s 127(1A) of the Act for forfeiture of the security deposit could be or was made.

(2) Section 128(1) was also not applicable as the forfeiture had to be be confined to the goods seized and the proceeds of sale under s 115(c) and did not include the security deposit provided under s 115(b). Furthermore, the effect of s 128(1) which deems the goods seized or their proceeds of sale to be forfeited at the expiration of one calendar month, are lost by the words in s 128(1)(c), unless 'such goods are returned' under s 115(a) or (b). As the goods were returned to the respondent, the security deposit was not forfeitable.

[Bahasa Malaysia summary

Responden telah memohon untuk suatu perintah bagi pemulangan jaminan sebanyak RM1,158,224.80 yang telah dibayar olehnya kepada perayu untuk memperolehi pelepasan 1,840 karton rokok yang telah diimport oleh responden tanpa lesen dan yang telah disita oleh perayu di bawah s 114(1) Akta Kastam 1967 ('Akta itu'). Hakim Mahkamah Tinggi telah membenarkan permohonan itu dengan perintah bahawa jumlah itu dipulangkan selepas ditolak jumlah RM5,000 yang kena dibayar kepada perayu sebagai fee kompaun untuk kesalahan yang dikatakan telah dilakukan oleh responden di bawah s 135(1)(a). [Lihat [1994] 3 MLJ 669.] Perayu telah membuat rayuan terhadap perintah itu dengan menegaskan bahawa hakim perbicaraan telah silap kerana tidak memberi kesan kepada ss 128(1) dan 131(3) Akta itu dengan memerintahkan perlucuthakan jaminan itu. Perayu berhujah bahawa ia diberi kuasa untuk melucuthak jaminan itu di bawah s 128(1) Akta itu kerana barangan itu telahpun dilepaskan.

Diputuskan, menolak rayuan itu:

(1) Jaminan itu diminta diberikan di bawah s 115(b) Akta itu sekiranya mahkamah membuat perintah untuk perlucuthakan jumlah tersebut di bawah s 127(1A) atau s 128(4). Oleh itu, hakim tidak mungkin bertindak di bawah s 131(3) untuk memerintahkan perlucuthakan di bawah s 127(1A) ataupun s 128(4). Lagipun, oleh kerana suatu pendakwaan responden tidak dilakukan, itu bererti bahawa suatu perintah di bawah s 127(1A) Akta itu untuk perlucuthakan jaminan itu tidak boleh dibuat.

(2) Seksyen 128(1) juga tidak terpakai kerana perlucuthakan itu mesti dihadkan kepada barangan yang disita dan hasil jualannya di bawah s 115(c) dan tidak termasuk jaminan yang diberikan di bawah s 115(b). Lebih-lebih lagi, kesan s 128(1) yang menyifatkan barangan yang disita itu dan hasil jualan mereka sebagai dilucuthak pada akhir satu bulan kalendar, dihilangkan oleh perkataan di dalams 128(1)(c), melainkan 'barangan tersebut dipulangkan' di bawah s 115(a) atau (b). Oleh kerana barangan itu telah dipulangkan kepada responden, jaminan itu tidak boleh dilucuthak.]

Legislation referred to

Customs Act 1967 ss 114(1), 115(1)(b), 127(1A), 128(1), (4), 131(1), (2), (3)

Appeal from: Originating Summons No R2–10 of 1994 (High Court, Kuala Lumpur)

Hazman bin Ahmad (Federal Counsel) for the appellant.
Harpal Singh Grewal (*AJ Ariffin Choo & Harpal*) for the respondent.

Cur Adv Vult

Abu Mansor JCA (delivering the judgment of the court): This is an appeal against the judgment of Siti Norma Yaakob J granting the respondent's application with an order returning the security deposit in the hands of the appellant in the sum of RM1,158,224.80 less the RM5,000 payable to the appellant as a compound to this offence allegedly committed by the respondent. After hearing learned counsel for the appellant, we found that there was no merit in the appeal and we dismissed it with costs. We now give our reasons.

In June 1993, the respondent illegally imported 1,840 cartons of cigarettes from Singapore in contravention of the Customs Act 1967 ('the Act'). The appellant, pursuant to their powers under s 114(1) of the Act, seized these offending goods on 20 August 1993.

As the appellant's decision was to return the goods, the appellant, on 2 September 1993, acting under s 115(1)(b) of the Act, called upon the respondent to provide a security deposit and when that was done, had the goods returned with a further condition that the goods were to be exported. The respondent having paid the amount of RM1,158,224.80 as the security deposit called for, exported the returned goods. It is relevant to set down this s 115(1)(b) and it reads:

> Return or disposal of movable property.
>
> (1) Where any movable property has been seized under this Act, a senior officer of customs may, at his discretion —
>
> ...
>
> (b) return the movable property to the owner thereof or to the person from whose possession, custody or control it was seized, or to such person as a senior officer of customs may consider entitled thereto, with liberty for the person to whom the movable property is so returned to dispose of same, such return being subject to security being furnished to the satisfaction of a senior officer of customs in an amount not less than an amount which, in the opinion of a senior officer of customs, represents —
>
> (i) the open market value of such property on the date on which it is so returned;
>
> (ii) the customs duty payable in respect thereof; and
>
> (iii) any tax payable in respect thereof under any written law,
>
> for the payment of the amount so secured to the Director General in the event of the court making an order for the forfeiture of such amount under section 127(1A) or 128(4); or
>
> (c) sell or destroy the movable property, as appropriate in the circumstances, where it is a living creature or where, in the opinion of a senior officer of customs, it is of a perishable or dangerous nature or likely to speedily deteriorate in quality or value, and where it is so sold, he shall hold the proceeds of sale to abide the result of any prosecution or claim.

We observed that for reasons known only to the appellant, the respondent's offence was regarded as not that serious. Following this view taken by the appellant, they sent a letter to the respondent on 19 January 1994 compounding the alleged offence. Paragraph 3 of the said letter said:

> (3) Dengan kuasa yang diberi kepada saya di bawah s 131 Akta Kastam 1967, saya dengan ini menawarkan supaya kesalahan-kesalahan tersebut dikompaun sebanyak RM5,000 (RM lima ribu sahaja). Sekiranya tuan menerima tawaran kompaun ini, kesalahan tersebut akan selesai di sini dan tidak akan dibawa ke mahkamah. Barang-barang yang telah dirampas, jika ada, akan dilucut hak.
>
> (4) Tawaran kompaun ini hendaklah dijelaskan dalam tempoh 14 hari dari tarikh surat ini. Kegagalan tuan berbuat demikian akan membolehkan bahagian ini mengambil tindakan mahkamah.

The respondent failed to pay the amount of compound demanded. In the normal course of events, the respondent having been given time to pay and the period having elapsed, the appellant could have charged the respondent with an offence. This was not done. The respondent then brought an originating summons dated 16 February 1994 against the appellant praying for an order or orders that the appellant do return the security deposit saying that it was not forfeitable. The learned judge after hearing argument concluded that the security deposit be returned less the RM5,000 to be paid as compound fee. Hence this appeal.

Before us, the learned Federal Counsel appearing for the appellant strenuously contended that the learned judge erred in the order she gave and she erred in her interpretation of the Act in the relevant provisions thereof.

First, he said that the learned judge erred in not giving effect to s 131(3) of the Act. We set down s 131(1), (2) and (3) of the Act in order that we might understand the argument thus:

> Compounding of offences
>
> (1) Any senior officer of customs may compound any offence, which is prescribed to be a compoundable offence, by accepting from the person reasonably suspected of having committed such offence a sum of money not exceeding five thousand ringgit.
>
> (2) In like manner the proper officer of customs, not being a senior officer of customs, may compound any offence which is prescribed to be compoundable by such officer, by accepting from the person reasonably suspected of having committed such offence a sum of money not exceeding one hundred ringgit.
>
> (3) On the payment of such sum of money the person reasonably suspected of having committed an offence, if in custody shall be discharged, any properties seized shall be released and no further proceedings shall be taken against such person or property, unless the property consists of goods the import of which is prohibited in which case such goods shall be forfeited:
>
> Provided that where the prohibition is conditional upon a licence being issued in respect of the import of such goods, a senior officer of

A customs may release such goods if a licence is subsequently issued by any relevant authority.

We were unanimous in informing the learned Federal Counsel that the security deposit was, in fact, called for in exercise of powers under s 115(b) thereof 'for the payment of the amount so secured to the Director General B in the event of the court making an order for the forfeiture of such amount under s 127(1A) or s 128(4); or ...'. The panel was also unanimous that the learned judge could not possibly have acted under s 131(3) to order forfeiture of the amount deposited to the forfeiture under s 127(1A) or s 128(4). Hence his complaint on this ground did not make any headway C with us.

It was clearly established in this case that no prosecution of the respondent ever took place. It follows that no order under s 127(1A) of the Act for forfeiture of the security deposit could be or was made.

When pressed further as to where exactly the learned judge erred, D learned counsel for the appellant argued that as there was absence of prosecution of the respondent in this case, the appellant is empowered to proceed under s 128(1) of the Act giving the Director General of Customs power to have the security deposit forfeited bearing in mind the goods had already been released. Said in another way the learned judge was, so they say, in error when she did not allow the appellant to forfeit the security E deposit.

In order to appreciate the merit (if any) of the argument of the learned Federal Counsel, we set down s 128(1) of the Act. It reads:

> Goods seized in respect of which there is no prosecution, or the proceeds of sale thereof, are forfeited if not claimed within one month.
>
> F (1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph (c) of subsection (1) of section 115 shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such G expiration —
>
> (a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);
>
> (b) a written application is made for the return of such goods under paragraph (a) or (b) of subsection (1) of section 115; or
>
> H (c) such goods are returned under the said paragraph (a) or (b).

We were unanimous in our views that s 128(1) is not applicable to assist the appellant to have the security deposit forfeited in that, in the circumstances of the present case, forfeiture must be confined to 'such goods' and the proceeds of sale under para (c) of s 115. The security I deposit provided under para (b) thereof cannot be forfeited under s 128(1). What is deemed to be forfeited at the expiration of one calendar month of such seizure is 'such goods' and the proceeds of such sale and the deeming provision of the section loses its steam by the words 'unless ... (c) *such*

goods are returned under paragraph (a) or (b) [of section 115]' (emphasis added). It is clear that the security deposit is therefore not forfeitable in our view.

Accordingly, we are unanimously agreed that the learned judge was correct in holding that the amount held as the security deposit could not be forfeited as claimed by the appellant or at all.

Accordingly the appeal was dismissed with costs.

Gopal Sri Ram and **VC George JJCA**: We concur with the above judgment of Abu Mansor JCA.

Appeal dismissed.

Reported by Anne Khoo